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No. 91-1631

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ST. MARY'S HOSPITAL, INC. ..... *Petitioner*

VS.

ARKANSAS BLUE CROSS AND BLUE SHIELD
A MUTUAL INSURANCE COMPANY ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Contrary to St. Mary's argument, no "important federal question" justifies granting certiorari in this case because the Eighth Circuit's decision upheld federal preemption in accordance with Congress' recognized intention to promote uniformity of laws with regard to employee welfare benefit plans.

There is no conflict between this Court's holding in *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988) and the Eighth Circuit's decision. *Mackey* was a narrow ruling, limited to the peculiar facts of that case, which included (a) garnishment statutes very different from the Arkansas assignment statute at issue in this case; and (b) the applicability of ERISA's "sue and be sued" clause, a provision clearly not implicated in the present case where only

voluntary assignments (not garnishments) are involved.

There also is no conflict between the Ninth Circuit's holding in *Davidowitz v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476 (9th Cir. 1991), and the Eighth Circuit's decision. *Davidowitz* did not even address any ERISA *preemption* question, but merely decided an issue of ERISA statutory interpretation. Furthermore, *Davidowitz* actually supports the Eighth Circuit's legal analysis in the present case in that (a) the Ninth Circuit, like the Eighth Circuit, rejected the claim that Congress' silence regarding assignment of welfare benefit plan benefits indicates any Congressional intention to bar restrictions on such assignments; and (b) *Davidowitz*, like the Eighth Circuit, upheld assignment restrictions contained in ERISA Plans.

INTRODUCTION

Before directly addressing the various arguments raised by St. Mary's in its brief, a comment about its overall tactics seems appropriate. We note the petitioner's tendency to use hyperbole and assertion in place of the serious legal analysis demanded of certiorari petitions. This is evident from the opening pages of its argument in which St. Mary's cites a non-existent "state ruling that there is no matter of state public policy more important than an insured's right of free assignability." *See* St. Mary's Petition, p. 12. Thus, St. Mary's begins its arguments to this Court with exaggerations having no basis in fact. St. Mary's cites no authority for the alleged elevation of insurance assignments above all other Arkansas public policy objectives, and neither of the state court rulings included in St. Mary's Appendix contains any such statement. The substantive content of this erroneous statement is of little consequence, but it does reflect how far St. Mary's has strained throughout its petition to assert grounds allegedly justifying discretionary review. We turn now to the specific points raised by St. Mary's as supposed reasons for granting certiorari in this case.

I.

BECAUSE THE EIGHTH CIRCUIT UPHELD PREEMPTION, THERE IS NO IMPORTANT DECISION OF FEDERAL LAW TO BE REVIEWED.

St. Mary's argues that an important question of federal law exists, thereby justifying grant of certiorari, merely because this case involves ERISA preemption, citing several cases in which ERISA preemption was the issue before this Court. But closer examination of these cases shows that certiorari was granted on grounds quite different from the "important federal question" basis now urged by St. Mary's. In *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S.

825 (1988), for example, this Court stated that certiorari was granted "[b]ecause of conflicting decisions among the courts on the questions presented here. . . ." 486 U.S. at 828-29. In *FMC Corp. v. Holliday*, ___ U.S. ___, 111 S.Ct. 403 (1990), the basis for certiorari was to "resolve this conflict" between federal circuits. 111 S.Ct. at 407. In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), this Court was concerned with the interplay between various state anti-discrimination statutes and the federal Pregnancy Discrimination Act, as well as disagreements in the courts "about the scope of ERISA's preemption provisions." 463 U.S. at 96, nn. 12, 13. In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) the grant of certiorari afforded review of a lower court decision which found *against* federal preemption in an area in which this Court has stressed the need for uniformity of federal over various and often conflicting state laws. *See Ingersoll-Rand Company v. McClendon*, ___ U.S. ___, 111 S.Ct. 478, 484 (1990) ("§514(a) [of ERISA] was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law. . . .").

Of the cases cited by St. Mary's, only *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) could ostensibly be classified as one in which importance of the federal question supplied the principal basis for this Court's discretionary review. However, the grant of certiorari in *Alessi* does not support St. Mary's claim of an important federal preemption issue in the present case. *Alessi*, a 1981 decision, was among this Court's earliest cases to address the preemptive scope of ERISA, which was enacted in 1974. Moreover, the ramifications of a preemption decision in *Alessi*, involving as it did the treatment of vesting of pension benefits for retired workers and the preservation of federal over state prerogatives in regulating collective bargaining agreements, were significantly broader than those posed by the quite narrow preemption issue St. Mary's now asks this Court to

review. This Court has emphasized that certiorari is available on "important federal question" grounds only where the issues are of paramount importance "to the public at large as distinguished from that of the parties. . . ." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

While it is undeniable that the preemption issue decided in this case is of great importance to Blue Cross and St. Mary's, its importance to the public at large and to federal preemption analysis in general is significantly diminished by the fact that the Eighth Circuit's decision upholds federal preemption in harmony with the universally recognized Congressional scheme to promote uniformity of law where employee welfare benefit plans are concerned. If the Eighth Circuit had instead upheld a parochial diversion from the uniformity principle underlying ERISA, then St. Mary's arguments regarding an allegedly "important federal question" might apply. As for frustration of the state legislature's purposes, also cited by St. Mary's on this point, such is the inescapable, constitutionally-mandated outcome in any case where the federal Supremacy Clause and state legislation collide.

Finally, the argument by St. Mary's that grant of certiorari is justified on "important federal question" grounds because the case implicates health care at a time when availability of health care services is a topic of public debate, improperly suggests that the question whether to grant certiorari should turn on some preliminary value judgment by this Court regarding the wisdom of requiring hospitals in St. Mary's position to undertake their own collection efforts when they cannot circumvent an ERISA Plan's assignment clause. In effect, St. Mary's argues that certiorari should be granted because if the preemption decision stands, and St. Mary's cannot enforce assignments which violate the terms of Blue Cross-insured ERISA Plans, then health care consumers will be hurt because St. Mary's will be forced by rising collection costs to reduce its assumed contributions to

indigent care. St. Mary's "bad things will happen" argument seems irrelevant in the context of this Court's own rules regarding the propriety of certiorari review. If practical impact was an appropriate consideration, however, this factor would favor denying certiorari and thereby sustaining the salutary potential impact of the Eighth Circuit's ruling, which cited health care cost containment as a principal goal of the Blue Cross participation agreement scheme, of which the Plans' assignment clause is an integral part. *See* St. Mary's Appendix I, pp. 15-16[1].

II.

THE ALLEGED "CONFLICT" WITH MACKEY IS CONTRIVED, NOT REAL.

The reasons offered by St. Mary's for alleging a "conflict" between the Eighth Circuit's ruling in this case and the narrow holding in *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825 (1988) are so vague and equivocal as to suggest that St. Mary's may have offered them in the hope that by virtue of confusion alone a seeming "conflict" could be created. The ill-defined nature of the alleged "conflict" with *Mackey* makes it especially difficult to address St. Mary's arguments succinctly, but it is clear enough that the "conflict" points urged by St. Mary's proceed from the erroneous

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[1] *See also Davidowitz v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476, 1478 (9th Cir. 1991), which notes:

> Four state courts have held that similar non-assignment provisions in non-ERISA health benefit plans help keep medical costs down, do not violate public policy, and, are enforceable. *See Parrish v. Rockey Mountain Hosp. & Medical Servs. Co.*, 754 P.2d 1180 (Colo. Ct. App. 1988); *Kent General Hosp., Inc. v. Blue Cross & Blue Shield of Delaware, Inc.*, 442 A.2d 1368 (Del. 1982); *Augusta Med. Complex, Inc. v. Blue Cross of Kansas, Inc.*, 230 Kan. 361, 634 P.2d 1123 (1981); *Obstetricians-Gynecologists, P.C. v. Blue Cross & Blue Shield of Nebraska*, 219 Neb. 199, 361 N.W.2d 550 (1985).

assumption of a tight parallel, if not outright identity, between the Arkansas assignment statute at issue in the present case, and the Georgia garnishment statute considered in *Mackey*. In fact, in the one clear statement contained in its *Mackey* conflict arguments, St. Mary's flatly asserts, without benefit of explanation, logic or citation, that "Arkansas' Assignment Statute is purely and simply a statutorily mandated scheme for the collection of monies due," i.e., a virtual mirror of the Georgia garnishment statute. *See* St. Mary's Petition, p. 14.

Acceptance of this illogical, bare assertion by St. Mary's would render the Arkansas garnishment statutes, *Ark. Code Ann.* §16-110-401 *et seq.* (1987), a redundant, useless scheme. Moreover, St. Mary's false assumption of a close parallel between assignment and garnishment ignores historical treatment of garnishment as a specialized *procedural* matter, in contrast with assignment, which traditionally is deemed to be a matter of *substantive* law and rights. This Court in *Mackey* emphasized that "under Georgia law (at least), garnishment is a 'procedural' mechanism for the enforcement of judgments [which] creates no substantive causes of action, no new bases for relief, or any grounds for recovery. . . . Such is the usual understanding of garnishment." 486 U.S. at 835, n. 10. Likewise, the Arkansas Supreme Court has described garnishment as "a special statutory procedure." *Travelodge International, Inc. v. Handleman National Book Co.*, 288 Ark. 368, 705 S.W.2d 440, 441 (1986). By contrast, decisions of the Arkansas courts make it clear that assignment creates substantive rights and obligations, which the parties may sue to enforce. *See e.g., Pemberton v. Arkansas State Highway Commission*, 268 Ark. 929, 597 S.W.2d 605, 608 (Ark. App. 1980); *Newton v. Merchants & Farmers Bank*, 11 Ark. App. 167, 668 S.W.2d 51, 52 (1984). *See also* Chapter 15 of the *Restatement, Second, Contracts* §§316-343 (1981) for extensive treatment of the substantive law of assignment.

The simple fact is that *Mackey* is *sui generis* in the broad field of ERISA preemption law, its holding limited by factors peculiar to the case. As the Eighth Circuit pointed out, *Mackey*, unlike the present case, did not involve any state-imposed negation of otherwise proper provisions of ERISA Plans. *See* St. Mary's Appendix I, p. 13. Furthermore, in addition to the peculiar circumstances of state garnishment statutes, the *Mackey* decision was marked by its reliance on ERISA's "sue and be sued" clause, a provision which clearly indicates a Congressional intent *not* to preempt garnishment statutes, but one which just as clearly has no application in the present case where voluntary assignments (as opposed to garnishments) are concerned.[2] *See* St. Mary's Appendix I, p. 13. "*Mackey* was restrictively written (by a 5-4 court) to apply only to suits to attach or garnish funds held by an ERISA Plan." *Rollo v. Maxicare of Louisiana, Inc.*, 695 F. Supp. 245, 249 (E.D. La. 1988).

The Fifth and Ninth Circuits have expressly refused to extend *Mackey* beyond its own narrow confines, the Fifth Circuit specifically noting that state statutes which create substantive rights, as opposed to merely providing remedies for collecting judgments, cannot escape ERISA preemption under the limited *Mackey* decision. *See e.g., Sturgis v. Herman*

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[2]It is perhaps for this reason that St. Mary's, in arguments to the Court of Appeals, attempted to equate voluntary with involuntary assignments, arguing that the latter, at least, share some surface similarities with the procedural remedy of statutory garnishment. But the courts have recognized a clear dichotomy between voluntary and involuntary assignments, i.e., those deemed effective by operation of law. *See e.g., General Motors Corp. v. Buha*, 623 F.2d 455, 460 (6th Cir. 1980), which noted in the context of ERISA "a strong indication that Congress recognized the difference between voluntary and involuntary encroachments on benefit funds and has stated it specifically when both are forbidden." *See also, Restatement, Second, Contracts* §316, Comment d (1981), which notes the distinction "in accordance with common usage" between voluntary assignments and those achieved by operation of law.

Miller, Inc., 943 F.2d 1127, 1129-1130 (9th Cir. 1991); *Iron Workers Mid-South Pension Fund v. Terotechnology*, 891 F.2d 548, 555-556 (5th Cir. 1990). Clearly, in the present case, the Arkansas assignment statute has nothing to do with remedies for collecting state court judgments but rather, as interpreted by the Arkansas Supreme Court, and as argued by St. Mary's, would, if not preempted, create definable, substantive rights for ERISA Plan participants to control the payment of Plan benefits, and to seek legal redress if those rights are not recognized.

This brings us to yet another reason why the *Mackey* decision cannot support St. Mary's position. Unlike the garnishment statutes at issue in *Mackey*, which did not involve any interference with relations between ERISA entities or any impact upon administration of Plan benefits, the Arkansas assignment statute, if enforced as St. Mary's argues, would switch control over benefit assignments from the Plan fiduciary to the Plan participant, thereby directly affecting relations between ERISA entities, and complicating the Plan fiduciary's ability to efficiently administer (distribute) Plan benefits. *See* St. Mary's Appendix I, pp. 11-13. As noted by the court in *Rollo supra:*

> *Mackey* is distinguishable from the present case . . . for added reasons, not just because of its restrictive holding. *Mackey* involved a suit by a party not related to the ERISA plan. The *Mackey* respondents were attempting to sue the fund for reasons unrelated to the plan's administrative operation. In a case such as *Mackey*, Congress's intention that the administration of ERISA plans not be complicated with state law claims is not implicated.

695 F. Supp. at 249.[3]

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[3]*See also, Aetna Life Ins. Co. v. Borges*, 869 F.2d 142 (2nd Cir. 1989), where the Second Circuit pointed out that *Mackey* did not involve any

These obvious distinctions between *Mackey* and the present case make St. Mary's reliance on *Mackey* for certiorari purposes somewhat mystifying. The analytical fog is hardly clarified by St. Mary's statement that "[p]erhaps the most important conflict" between *Mackey* and the Eighth Circuit's holding in the present case is that the latter decision will result in disparate treatment between assignments made pursuant to ERISA Plans, and those which occur in the context of plans or policies not subject to ERISA. *See* St. Mary's Petition, p. 13. Why this supposedly calamitous result is calamitous, or, more importantly, why it conflicts in any way with either the reasoning or the result in *Mackey* is not explained in St. Mary's petition. This vague suggestion by St. Mary's that *Mackey* somehow decreed a ban on disparate treatment of non-ERISA plans appears to be based upon a complete misunderstanding of the relevant issue for which "disparate treatment" was noted by this Court in *Mackey*. In any event, it is not true, nor legally or logically defensible, that ERISA preemption depends upon whether the effect of applying federal law will be to accord different treatment to non-ERISA plans. In fact, so-called "special treatment" for ERISA Plans is the *sine qua non* of ERISA preemption because, without it, there would be no reason to distinguish ERISA Plans from any other policies or plans.

The point of this Court's mention of "disparate treatment" in *Mackey* was to highlight the fact that the *state law* there sought to *single out* ERISA Plans for special treatment, thus establishing on the face of the statute a "reference" or

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[3]continued

impact on "administration of plan benefits," but noted that a state law provision which would change the party to whom Plan benefits should be paid *did* affect administration of ERISA Plans sufficiently to support preemption. 869 F.2d at 147 [*citing MacLean v. Ford Motor Co.*, 831 F.2d 723 (7th Cir. 1987)]. Of course, that is precisely the effect of the Arkansas assignment statute in the present case.

"connection" to ERISA Plans, for purposes of applying preemption. 486 U.S. at 829-30. In ERISA statutory analysis, the fact of "disparate treatment" always *supports* a finding of preemption, making St. Mary's apparent argument to the contrary a curious one, to say the least. In point of fact, any time there is ground for ERISA preemption, the result will always be "disparate treatment" between the ERISA Plan, which avoids application of state law by federal preemption, and other entities which, because they lack federally-protected status, must comply with state regulations.[4]

Thus, *Mackey* certainly does not take the illogical position, as urged by St. Mary's, that "disparate treatment" is itself proscribed, or deemed impermissible. *Mackey* merely notes that "disparate treatment" for an ERISA Plan, on the face of a given state statute, signals clearly the "relatedness" required to trigger ERISA's preemption clause. In any event, the "disparate treatment" issue is irrelevant in this case because, as the parties concede, and as the state statute clearly shows on its face, the Arkansas assignment statute makes no attempt to single out ERISA Plans for special treatment, nor does it even mention such Plans. To the contrary, the Arkansas assignment statute unquestionably is one of general application.

Finally, we come to St. Mary's argument regarding *Mackey* and the anti-assignment clause of ERISA itself. ERISA contains a provision expressly forbidding assignment or alienation of *pension* plan benefits. 29 *U.S.C.* §1056(d)(1).

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[4]The differing treatment which is sometimes worked by ERISA's labyrinthine statutory scheme has been addressed by this Court in a slightly different context, i.e., where ERISA's "deemer clause" subjects insured ERISA Plans to some state regulations which do not apply to self-insured ERISA Plans. In such cases, this Court has indicated that the distinction, being statutory, is one the courts are bound to recognize and apply. *See Metropolitan Life Ins. Co. v. Commonwealth of Massachusetts*, 471 U.S. 724, 747 (1985).

However, ERISA makes no mention of assignment or alienation of *welfare* plan benefits, which are in issue in the present case. St. Mary's unsuccessfully argued before the Court of Appeals that Congress' silence on the issue of welfare benefit assignments should be construed to mean that ERISA forbids restrictions on assignment of welfare benefits.

The Eighth Circuit properly rejected St. Mary's strained interpretation of the statutory silence, finding that no inference was raised that by failing to mention the assignment of welfare plan benefits, Congress somehow intended to ban assignment restrictions where welfare benefits are concerned. *See* St. Mary's Appendix I, pp. 18-19. St. Mary's now argues that this conclusion by the Court of Appeals is error, claiming that the Eighth Circuit treated Congress' omission in the case of welfare benefit assignments as "insignificant" when this Court in *Mackey* had described the omission as "significant." But the Eighth Circuit did not treat the omission as "insignificant," it simply disagreed with St. Mary's about the impact such an omission should have. In fact, the Eighth Circuit concluded that because Congress dealt with the issue of assignment in the case of pension benefits, it is more likely that Congress intended state assignment laws to come within the general ambit of ERISA preemption. *See* St. Mary's Appendix I, p. 19. This precise conclusion of the Eighth Circuit is supported by a very recent decision of the Ninth Circuit Court of Appeals addressing the same argument which St. Mary's has raised. This case, *Davidowitz v. Delta Dental Plan of California, Inc.*, 946 F.2d 1476 (9th Cir. 1991), reversed a district court opinion which St. Mary's submitted to the Eighth Circuit at oral argument in support of its position. *See Davidowitz v. Delta Dental Plan of California, Inc.*, 753 F. Supp. 304 (N.D. Cal. 1990). Nevertheless, even the district court in *Davidowitz* had recognized that, on the issue of whether ERISA *requires* free assignability, "[t]he statute offers no express help . . . nor do the *Mackey* and *Misic* cases." 753 F. Supp. at 308.

The Ninth Circuit Court of Appeals in *Davidowitz* squarely addressed the argument regarding Congress' silence in the case of welfare benefit assignments:

> Even if it could be said that required assignability promotes certain ERISA policies, this Court would not create a construction requiring assignability in the face of Congressional silence on the issue. Both the Supreme Court and this Court have stated that Congress carefully considered assignment of both pension and welfare plan benefits, and consciously decided to prohibit pension plan assignments but remain silent on welfare benefits. *The court cannot agree with Appellees that Congressional silence on welfare benefit assignment shows a Congressional intent to mandate assignability. On the contrary, if Congress had intended this result, it could have said so. Having carefully considered the subject and chose to remain silent, this Court must conclude that Congress intended not to mandate assignability but intended instead to allow the free marketplace to work out such competitive, cost effective, medical expense reducing structures as might evolve.*

946 F.2d at 1480-81 (emphasis added). The Eighth Circuit's conclusion thus finds solid support in the deliberations of another federal circuit court, one of only two other courts which have addressed the precise issue. *See also Washington Hospital Center Corp. v. Group Hospitalization and Medical Services, Inc.*, 758 F. Supp. 750 (D.D.C. 1991) (holding that Congress' silence on assignability of welfare benefits does not indicate an affirmative policy favoring such assignments sufficient to invalidate otherwise valid non-assignment clauses). It should also be noted that the Ninth Circuit in *Davidowitz* expressly considered the garnishment analogy and the effect of the *Mackey* decision, on which St. Mary's relies, and rejected their relevance to the assignment issue:

> Appellees argue in effect that, if creditors can garnish

> plan proceeds notwithstanding a plan's non-assignment clause, then beneficiaries can also freely assign notwithstanding such a clause. *But the garnishment cases cannot be stretched that far. They simply hold that state law may provide a statutory mechanism for judgment collection, and such state procedure is not preempted by ERISA.*

946 F.2d at 1479 (emphasis added).

In arguing that ERISA compels free assignability of welfare benefits, St. Mary's not only contradicts the holdings and the logic of these decisions, St. Mary's also tacitly concedes that the state law at issue in this case does, in fact, "relate to" ERISA Plans. As stated by the Second Circuit in *Howard v. Gleason Corp.*, 901 F.2d 1154, 1157-1158 (2nd Cir. 1990), "A state law that purports to impose on an employer obligations of the same general type as those imposed by ERISA cannot be said to have only a "remote" or "tenuous" effect on the plan. . . . The plaintiff argues that since the New York law does not conflict with any express provision of ERISA in the sense that both laws could be enforced side by side, it is not preempted. . . . But here the state statute intrudes into an area that Congress intended to be fully occupied by federal statute." Likewise, in the present case, St. Mary's argues that ERISA, in effect, requires the same thing that the Arkansas assignment statute requires, i.e., free assignability of Plan benefits regardless of the terms of the ERISA Plan. The Eighth and Ninth Circuits and at least one federal district court have rejected this conclusion, and, of course, Blue Cross has argued that ERISA has no such effect. By shifting to this argument, however, and by choosing to focus on the garnishment analogy and *Mackey* in its petition for certiorari, St. Mary's has effectively conceded that the Arkansas assignment statute does "relate to" ERISA Plans.

III.

THE EIGHTH AND NINTH CIRCUITS' DECISIONS ACTUALLY ARE IN HARMONY RATHER THAN "CONFLICT".

If St. Mary's *Mackey* conflict arguments are obscure, its arguments regarding an alleged conflict with the Ninth Circuit Court of Appeals' holding in *Davidowitz v. Delta Dental Plan,* 946 F.2d 1476 (9th Cir. 1991) are even more so. It should first be pointed out that *Davidowitz* did *not* involve an ERISA *preemption* matter, i.e., there simply was no state law to be reconciled with ERISA in *Davidowitz,* thus no preemption question was presented. Instead the Ninth Circuit was called upon to consider "whether ERISA affirmatively mandates assignability of welfare benefit plan payments notwithstanding an express plan term prohibiting assignment." 946 F.2d at 1477. St. Mary's, in its search for a "conflict," takes one side comment from the court in *Davidowitz* regarding the fact that no statutory right of assignment was in issue, and wrongly asserts that the entire case turned on this non-factor.

The *only* mention of the presence or absence of a state law on assignability in the *Davidowitz* case came by way of distinguishing *Mackey* and other garnishment cases, which the appellees in *Davidowitz* argued in support of their contention that ERISA (not state law) mandated free assignability of welfare plan benefits. In rejecting this analogy to the garnishment cases, the Ninth Circuit pointed out that the appellees "do not rely on a separate statutory right or process that requires voluntary assignments be honored. *Thus, the question remains whether ERISA itself* mandates assignability. . . ." 946 F.2d at 1479 (emphasis added).

The Ninth Circuit's holding in *Davidowitz* clearly was

confined to interpretation of the ERISA statute itself, rather than to any conflict between ERISA and state law. Furthermore, its comment on the absence of a conflicting state law in *Davidowitz* in no way indicates how the Ninth Circuit would rule, one way or the other, on an ERISA preemption claim *if* the issue was ever presented to it in a state assignment law context[5]. St. Mary's argument to the contrary is unfounded and disingenuous. The other case cited by St. Mary's, *Washington Hospital Center Corp. v. Group Hospitalization and Medical Services, Inc.*, 758 F. Supp. 750 (D.D.C. 1991), is not a federal circuit decision, as required to show a "conflict" basis for Supreme Court review. More importantly, the *Washington Hospital* case also could not possibly be in "conflict" with the Eighth Circuit's holding because, like the *Davidowitz* case, *Washington Hospital* did not involve any question of ERISA *preemption*.

Finally, it is appropriate to note perhaps the most curious of the several contradictions and misconceptions which appear in St. Mary's petition. At page 19 of the petition, in concluding its arguments regarding the alleged conflict with *Davidowitz*, St. Mary's asserts that "BCBS was not able to persuade the Arkansas courts that its assignment restriction clause was effective in reducing healthcare [sic] costs, and the court found no public policy support for the assignment restriction clause. . . . *Because consideration of that issue should have governed the decision of the Eighth Circuit*, and did not, this Court should grant certiorari review. . . ." (emphasis added) The oddity of this assertion results first from its obvious irrelevance to the federal preemption issue decided in this case, but is further compounded by the

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[5]Despite the fact that ERISA preemption was not in issue in *Davidowitz*, it is perhaps appropriate to observe that the limited holding in that case is, if anything, *consistent* with the Eighth Circuit's ruling in the present case, i.e., *Davidowitz* upheld the welfare benefit plan's anti-assignment clause.

fact that St. Mary's itself previously maintained before the district court that "effect on health care costs is wholly irrelevant to the issue at hand. . . . The collateral impact upon health care costs, beneficial or detrimental, is irrelevant to the issue of preemption." *See* Joint Appendix to Eighth Circuit, pp. 65-66; Appendix A to this Brief, p. A-1.

CONCLUSION

This case does not justify exercise of the extraordinary, discretionary writ of certiorari in that it fails to meet any of the standards imposed by Rule 10 of this Court for invoking certiorari review. Accordingly, the petition for writ of certiorari to the Eighth Circuit Court of Appeals should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing brief in opposition to petition for writ of certiorari has been served, in accordance with Supreme Court Rules 29.3 and 29.5(b), upon Charles R. Nestrud, Chisenhall, Nestrud & Julian, 400 W. Capitol, Suite 2840, First Commercial Bank Building, Little Rock, Arkansas 72201, attorneys for St. Mary's, and upon the Honorable Stephen M. Reasoner, United States District Court, United States Post Office and Courthouse, Little Rock, Arkansas 72201, by placing a copy in the U.S. Mail addressed to each at his respective office with sufficient prepaid postage, this 4th day of May, 1992.

/s/ Allan W. Horne

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Arkansas Blue Cross and Blue Shield,
A Mutual Insurance Company ..... Plaintiff

vs. No. LR-C-90-89

St. Mary's Hospital, Inc. ..... Defendant

St. Mary's Hospital's Reply To Plaintiff's Response To Motion To Dismiss and Response To Plaintiff's Cross-Motion For Summary Judgment

(Joint Appendix To Eighth Circuit, pp. 65-66)

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BCBS provides no authority for its argument that the goal of ERISA is to contain health care costs and that any law which even arguably might inhibit that goal must be preempted. Indeed, neither ERISA itself nor any of the cases construing its provisions speak to this issue at all. Therefore, even assuming, without conceding, that BCBS's hospital reimbursement plan is an effective cost containment mechanism, its effect on health care costs is wholly irrelevant to the issue at hand. The only issue here is whether the Arkansas General Assignment Statute is preempted by ERISA. The collateral impact upon health care costs, beneficial or detrimental, is irrelevant to the issue of preemption. (Footnote 8: That issue is, however, before the state trial court where BCBS claims that the public policy in favor of cost containment supports BCBS's assignment restriction.)